In the Supreme Court of the United States

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Petitioners,
vs.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., *et al.*,
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REPLY BRIEF OF PETITIONERS TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Cases Cited or Distinguished.

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Each of the three respondents has filed a brief in opposition to petitioners' petition for writ of certiorari.

Respondent Citizens Gas Company says that it has fully performed all its duties and obligations as initial trustee of a public charitable trust, and its obligations to Indianapolis Gas have ceased. As to the primary controversy, Citizens Gas has no interest (brief p. 4) and has adopted a completely neutral position in respect thereto.

The petitioners make no further reply to Citizens Gas.

The briefs of respondents The Chase National Bank of the City of New York, Trustee, and Indianapolis Gas Company, assert identical grounds of opposition to petitioners' petitions, stated in the same order and in strikingly similar language, so that petitioners are submitting this one brief in reply.

SUPPLEMENTAL STATEMENT OF FACTS.

Respondents in their statements of facts leave opportunity for drawing incorrect inferences:

1. It is recited that Citizens Gas sold $2,000,000 of Indianapolis Gas Bonds to the public on representations that it had a 99 year lease. (Chase p. 2.)

2. In the sale of revenue bonds the City issued a prospectus to prospective security firms as bidders in which it was stated that the gas system of Citizens Gas was held partly under a 99 year lease. (Indianapolis Gas p. 5.)

Petitioners point out that no bondholder was or is a party to this action. There is no showing that any present bondholder of Indianapolis Gas relied on any statements made by Citizens Gas or the City. The bidders on the City of Indianapolis Gas Plant Revenue Bonds sold in 1935 are not parties to these actions and there is no showing of any reliance having been placed by them on any statements. No party in this case has any concern with the revenue bonds except the Utilities District of the City of Indianapolis.

3. Respondents say the City accepted and recorded the various instruments of transfer (of property from Citizens Gas to City) including an assignment of the lease. (Chase p. 2; Indianapolis Gas p. 5.)

The record shows the four instruments were "all four handed either to Mr. Rabb or to Mr. Dithmer or somebody there representing the City." (R. 467.) The same witness testified that at the same meeting there was delivered to him a rejection of the 99 year lease by the City and a certified copy of a resolution of the Board of Directors for Utilities of the City rejecting the 99 year lease. (R. 468.) Acknowledgment of receipt of the rejection of the lease was made by Henry H. Hornbrook, attorney for and director of Citizens Gas. (City's Ex. 13, R. 1043; offered R. 433.) The Circuit Court of Appeals first held that the City "ac-

cepted" the instruments of transfer but on July 19, 1940, the Court modified its opinion in this particular, among others (R. 1335), and held that "these instruments were *received*, retained and duly recorded by the City. On the same day, September 9, 1935, the Board of Directors passed two resolutions: one rejecting the lease and refusing to assume the lease obligations; the other accepting the property held under the lease temporarily and *solely* to prevent interruption of service." (Our emphasis.) (R. 1292.)

4. Both respondents assert in their briefs that there was no agreement concerning the City's use of the property until March 2, 1936. (Chase p. 3; Indianapolis Gas p. 6.)

On July 23, 1935, the City notified Indianapolis Gas it would acquire the Citizens Gas property but without liability for obligations of Citizens Gas and that it would be willing to negotiate a new lease. (R. 836; offered R. 326, 327, 434, 1057, 1058.) On August 31, 1935, the City in a letter to Indianapolis Gas referred to recent conversations between representatives of the City and Indianapolis Gas, and pointed out that the City wished to know if Indianapolis Gas would permit the City to operate the property for a period of six months after the take-over scheduled for September 9, 1935. (R. 837; offered R. 326, 327, 434, 1057, 1058.)

The City on September 27, 1935, wrote Indianapolis Gas:

> "We have had no response from you to our repeated requests for an opportunity to negotiate a lease for the use of your property by the City of Indianapolis.
>
> "That there may be no misunderstanding of our position, we desire to obtain from you an agreement for the use of your property by the City of Indianapolis in connection with its operation of property acquired from Citizens Gas Company of Indianapolis, and upon terms that are both appropriate and fair. Therefore we have asked, and we now ask, that you inform us

whether you are willing to undertake to negotiate such an agreement.

"This is a matter not merely of private interest, but of public concern. * * *." (City's Stip. Ex. 63, R. 967; offered R. 326, 434.)

On September 30, 1935, the letters of the City were acknowledged and Indianapolis Gas expressed its willingness to agree with the City respecting operation of the property. (R. 838; offered R. 326, 434.) On February 28, 1936, Indianapolis Gas wrote the City referring to "our tentative agreement" which was to expire on March 9, 1936. (R. 839; offered 326, 327, 434.)

On November 6, 1935, the Board of Directors of Indianapolis Gas instructed the corporation secretaary to formally notify Chase "of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine years lease. * * *" (R. 1013; offered R. 428.)

Indianapolis Gas, on November 7, 1935, wrote Chase in accordance with instructions:

"Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease. * * *

"Under the circumstances, this Company, through action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operations of the property of this Company for a period of six months pending negotiations. * * *" (R. 1013; offered R. 428; R. 926; offered R. 369.)

There is no doubt that Chase understood exactly what the City had done or was trying to do. On September 19, 1935, Chase addressed a letter to William G. Irwin, President of Indianapolis Gas, in which it said:

> "We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District *is attempting to abrogate the lease* made by your Company with the Citizens Gas Company in 1913. (R. 926; offered R. 367.)

ARGUMENT.

The arguments of respondents Chase and Indianapolis Gas are the same in substance and in order of presentation, thus both will be answered together without reference to each separately.

I.

It is asserted by respondents that the City's claim of a denial of due process of law is "fanciful." It is argued that the Court of Appeals came to the conclusion "as a matter of law that the City's allegation of 'burdensomeness' presented no defense. * * *" What the Court of Appeals actually held in respect of burdensomeness was this:

> "In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that Court did not find the lease in question unreasonable as to time or as to its terms. *Williams vs. Citizens Gas, et al.*, 206 Ind. 448, 458, 460."[1] (R. 1300.)

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[1] The *Williams* case (206 Ind. 448) is dealt with hereafter to show that it did not adjudicate the questions involved here.

The petitioners had the right to rely on the reservation of the issue of burdensomeness and to believe it would be heard on that issue, both on questions of law and fact, before judgment. The City was not bound to take in advance the precaution of putting in its evidence on this reserved issue; indeed would have had no right to do so because of the reservation.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, 320, 61 L. ed. 1163, 1165 it was pointed out that the record did not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted the writ of error. It was held that ordinarily such assertion of claim of right would not be enough.

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In these cases at bar the issue of the burdensome character of the lease was expressly reserved by the District Court without objection or exception by any party, and no evidence was introduced by petitioners or by anyone else on such issue. (R. 321, 322.) As this Court in the case last cited pointed out, there can be no certainty that the petitioner's rights have been protected without giving it a chance to put its evidence in.

Petitioners were not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard. It is clear under the decisions of this Court that petitioners are entitled to be heard on the questions of both law and fact

on the reserved issue of burdensomeness before a decision is rendered against them.

Respondents contend that the approval of the lease by the Public Service Commission of Indiana upon the joint petition of Indianapolis Gas and Citizens Gas and its determination "that the lease was in the public interest, hence not burdensome—is binding upon all the world. * * *."[2] (Chase p. 7; Indianapolis Gas p. 7.)

The Public Service Commission was created by Chapter 76, Acts of Indiana General Assembly 1913 (p. 167) as an instrument of the executive department of the state.

The approval of the lease by the Commission could not operate in any way as an adjudication of the enforceability of the lease against the City. The order of approval was wholly administrative in character and was not judicial.

It is firmly settled in Indiana that the Public Service Commission is "purely an administrative or legislative body without judicial power."

Public Service Commission of Indiana, et al. vs. City of LaPorte, et al., 207 Ind. 462, 465;
New York etc. R. R. Co. vs. Singleton, et al., 207 Ind. 449, 458.

The authority given to the Commission to fix rates and approve leases of public utility property was given for the sole purpose of enabling the Commission to protect the public interest. It was never intended that by conferring such jurisdiction on the Commission it should be vested with authority to make a judicial declaration which would determine private rights of persons not parties to the lease, especially where such private rights depend upon the decision of justiciable questions.

The entire purpose of the statute is to safeguard the public interest and to see that leases or sales are not made

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[2] Chase in its complaint as amended does not allege that the lease is valid but seeks to bind the City to the 99 year lease on the grounds of estoppel and res adjudicata.

by one utility to another unless in the opinion of the Commission they are in the public interest.

Any assertion that the Commission's approval of the lease determined the liability of the City in respect of the obligations contained in the lease is made in disregard not only of the obvious purpose of the statute and the scope of the Commission's authority thereunder, but also in complete disregard of the repeated decisions of the Indiana Supreme Court.

In referring to Section 95 of the Act creating the Public Service Commission, the Indiana Supreme Court said:

> "By this enactment the Legislature has vested it (Public Service Commission) with authority subject to review by the courts, to supervise or regulate the terms of sale *insofar only as they affect the public.*" (Our emphasis.)
>
> *In re: Northwestern Telephone Co., et al.*, 201 Ind. 667, 680.

Petitioners are cognizant of the rule that where the Commission has jurisdiction to decide questions of fact and enter an order thereon, and acts within its jurisdiction, its decision is conclusive on the courts in a collateral action. But the order of the Commission approving the lease went no further, and could go no further, than to determine upon the facts adduced, whether it was advisable and in the public interest that the property of Indianapolis Gas be leased to Citizens Gas on the terms stated in the Commission's order.

The Commission had no power to decide either the liability of the City[3] under the terms of a lease not executed or ratified by it, or the length of the term of the lease for which the parties might lawfully contract.

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[3] At the time of the Commission's approval of the lease (October 1, 1913, R. 122) no claim had been asserted that a public charitable trust had been created and it was still seventeen years before a transfer of the property was to be made to the City.

The Commission could not and did not determine whether the 99 year lease would be burdensome on the City as successor trustee of a public charitable trust seventeen years in advance of the time the City assumed the trusteeship.

The case of *Williams vs. Citizens Gas* (206 Ind. 448) did not decide as against the City any of the issues presented here. The case was decided on a demurrer to the complaint and no evidence was introduced.

The following language of the Indiana Supreme Court shows clearly the scope of the decision (pp. 458-459):

> "If *the lease was improvident* from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets acquired under the terms of the lease, *no facts are alleged to support such a conclusion.* And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and 'recapture' of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the Public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same." (Our emphasis.)

The case of *Williams vs. Citizens Gas* (206 Ind. 448) is not res adjudicata because:

> 1. The issues in the *Williams* case were essentially different from the issues in this case. The enforceability of the lease against the City and the right of the initial trustee (Citizens Gas) to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the *Williams* case.

In *Troxall vs. Delaware R. Co.*, 227 U. S. 434, 440, the leading case on estoppel of a judgment when different issues are presented is cited, viz.: *Cromwell vs. Sac County* 94 U. S. 353, 24 L. ed. 195, 198, 199. In *Sac County* case an action was brought on four bonds of Sac County and four interest coupons. To defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by another person but prosecuted for the sole benefit of the plaintiff in the last case. The issue of whether the plaintiff was a good faith purchaser of the bonds had not been but could have been litigated in the prior action.

In holding the judgment not res adjudicata, this Court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

2. The Transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of res adjudicata. When the *Williams* case was finally decided (December 22, 1933) the City had not taken over the trust res and until that was done the question of the burdensomeness of the lease to the City was not in issue. No attempt was made to obtain a declaratory judgment against the City in

respect of any *obligation* supposed to be imposed upon it under the terms of the lease.

In *Third National Bank of Louisville vs. Stone*, 174 U. S. 423, 434, 43 L. ed. 1035, 1036, this Court said:

> "A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen."

3. Although Indianapolis Gas and its mortgage trustees and the City were co-defendants, neither Indianapolis Gas nor its mortgage trustees tendered any issue to their co-defendant, City, in respect of the burdensome or non-burdensome character of the 99-year lease.

In *Whitesell, et al. vs. Strickler, et al.*, 167 Ind. 602, 616, it was held that:

> "Where two or more defendants make issue with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been, but was not, put in issue by a proper pleading."

The above rule of law is still the rule in Indiana.

In *Pepper vs. Litton*, 308 U. S. 295, 84 L. ed. 196, 205, this Court had before it the question of whether or not a judgment of a Virginia court was res adjudicata. A trustee with permission of the bankruptcy court moved in the state court to set a judgment aside. The judgment was held void but the trustee was estopped to challenge it. Thereafter the question of allowance of the judgment came before the bankruptcy court. The bankruptcy court concluded that the decision of the state court that the trustee was estopped to attack the judgment did not prevent the bankruptcy court from considering its validity. The District Court disallowed the trustee to recover the proceeds impressed at the execution sale had on the judgment.

In sustaining the District Court, Justice Douglas, speaking for this Court, said:

> "In the first place, res judicata did not prevent the District Court from examining into the Litton judgment, and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face. He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz.: that it was void *ab ignitio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court, under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there."

It is quite apparent that since the burdensomeness of the lease to the City as successor trustee was not decided in the *Williams* case, it could not operate as res adjudicata. The Circuit Court of Appeals in directing judgment to be entered against the City with no opportunity to be heard on the reserved issue of burdensomeness denied to the City due process of law.

II.

Respondents contend that Indianapolis Gas should not be realigned with Chase and thus destroy diversity of citizenship, the sole ground of jurisdiction, for the reason that a coercive judgment was entered in favor of Chase against Indianapolis Gas. As Chase admits Indianapolis Gas is only "tertiarily liable." As pointed out in petitioner's original brief (pp. 27, 28) Indianapolis Gas is completely insulated from liability.

Perhaps no stronger evidence appears in this record of the complete unanimity of interest of Indianapolis Gas and Chase than the brief of Indianapolis Gas filed in opposition to petitioner's petition for writ of certiorari.

If the interests of respondents were not in accord it is difficult to understand why Indianapolis Gas wishes to oppose the review by this Court of a judgment allegedly against it of more than $1,000,000.

III.

Chase points out (p. 11) the Court of Appeals made no decision on the question of estoppel; its decision was based primarily upon its independent conclusion that the lease is valid; and that it is not clear whether the court regarded the cases referred to as determinative on the ground of res adjudicata.

As pointed out, the complaint did not allege that the lease was valid but asserted that the City was bound by estoppel and res adjudicata. (R. 12, 13, 14, 15, 18, 19.) Thus the Court of Appeals decided the case on an issue never presented to the trial court by the complaint and on a theory never litigated on the complaint.

IV.

Respondents say the judgment ordered entered imposes no burden on revenues raised by taxation by the City.

If the Court of Appeals meant that the judgment when entered was not payable from taxation revenues, it would

presumably have said so since the City expressly called the Court's attention to the point. (R. 1312, 1313, 1350, 1382.) The insertion in the opinion of the words "as successor trustee" by way of amendment (R. 1335) does not remove the need for payment of the judgment, when entered, by the City from revenues raised by taxation if the income from the property and the property itself are inadequate to make the required payment.

CONCLUSION.

If the decision of the Circuit Court of Appeals is to stand, the City will be liable for rental payments of approximately $45,000,000 under the terms of a 99 year lease which the City did not sign or execute, to which it was not a party, in which it is not named as a party, of which it is not an assignee, which it has neither confirmed, adopted, approved or ratified, but which the City has expressly rejected by proper action of the only municipal body having any power to deal with the lease.

The questions presented by petitioner's petitions are fundamental and important ones: denial of due process of law, refusal to realign parties in accordance with their relation to the main controversy, disregard of the rule of this Court in *Erie Railroad vs. Tompkins* (305 U. S. 64).

Wherefore, petitioners pray that the writ be granted.

Respectfully submitted,

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